SUPREME COURT, No. [illegible]

Supreme Court of the United States

OCTOBER TERM, 1963

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DEAN ACHESON,
W. GRAHAM CLAYTOR, JR.,
701 Union Trust Building,
Washington 5, D.C.

MALCOLM L. MONROE,
1424 Whitney Building,
New Orleans, Louisiana.
Attorneys for Petitioner.

MONROE & LEMANN,
WALTER J. SUTHON, III,
JERRY A. BROWN,
1424 Whitney Building,
New Orleans, Louisiana.

COVINGTON & BURLING,
BRICE M. CLAGETT,
701 Union Trust Building,
Washington 5, D. C.
Of Counsel.

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INTRODUCTION

The Briefs in Opposition, while arguing the merits at great length, make no serious attempt to deny that the question decided by the Court of Appeals under the National Bank Act, 12 U.S.C. § 36(c), is a question of fundamental and far-reaching importance in the interpretation and administration of the federal banking laws, which has never been but should be decided by this Court. As the Comptroller of the Currency stated in his petition for certiorari (pages 22, 23), "the holding that a separately chartered and incorporated bank may be treated as a branch will have

a broad and continuing impact upon the regulation of the industry and, perforce, the industry itself. . . . The broad implications of the decision, made in apparent disregard of the Congressional scheme, make it important that the issue be definitively resolved by this Court."

This reply brief is necessary because respondents also contend that certiorari should be denied for the reason that the decision of the Court of Appeals can be upheld on a ground not adjudicated by it—that is, that the opening for business of Whitney-Jefferson would have violated a Louisiana statute enacted in 1962, while this case was before the District Court.

Here, too, respondents dwell heavily on the alleged merits of this asserted alternative ground; but they do not and cannot deny that this ground, also, presents a question of far-reaching importance in the interpretation and administration of the federal banking laws which has never (because the Louisiana statute is unprecedented) been decided by this Court.

The manner in which the grounds of decision have alternated in this case is as fascinating as it is baffling. First, the District Court, ignoring the question whether the opening of Whitney-Jefferson would violate 12 U.S.C. § 36(c), decided that it would violate the Louisiana statute. The Court of Appeals, in turn, ignored the Louisiana statute, and held—on a wholly improper assumption of fact in a summary-judgment proceeding—that the opening of the bank would violate 12 U.S.C. § 36(c). Now, when petitioner asks for review of this novel, disruptive and erroneous ruling, respondents raise the Louisiana statute as an alternative ground on which the decision on appeal might have been, but was not, rested.

Petitioner's plea is to get whatever peas there are

out from under the shells, and to procure an authoritative decision for the benefit of the banking authorities and the banking community as to what may lawfully be done in the common and important situation involved here.

ARGUMENT

I

RESPONDENTS DISTORT THE QUESTIONS PRESENTED BY THE PETITIONS

Respondents' contention that this case is similar to others in which courts have "pierced the corporate veil" is wide of the mark. Petitioner demonstrated (1) that separately incorporated national banks are prevented by many provisions of federal law from operating as though they were in substance branches of a single national bank (Petition, pages 9-10, 18-19, 24); (2) that Congress has long recognized that some, though not all, of the advantages of branch banking, where branch banking is illegal, can be obtained through a holding company system, and yet has expressly refused to apply branch-banking restrictions to bank holding companies (Petition, pages 9-10, 13-17); and (3) that the Whitney holding company system is not distinguishable in form, substance, intent or effect from the traditional, well-recognized and congressionally approved bank holding company in operation throughout the United States as a partial alternative to branch banking (Petition, pages 10-15, 19-21).

Whitney's petition also presented for review the question whether the Court of Appeals had not seriously ignored the proper bounds of summary-judgment procedure by deciding the case on the basis of a view of the facts never argued to it or the District Court,

never found by the District Court, and contradicted by sworn material in the record (Petition, pages 20-25). Respondent's argument in reply is that petitioner as well as respondent had moved for summary-judgment and had agreed that the case involved no disputed issues of fact which required a trial. But this is no answer, since the alleged "fact" which the Court of Appeals found controlling—that Whitney-New Orleans "intends to do business through Whitney-Jefferson in the same way as if the institutions were one" [1]—had never been alleged by respondents. No such allegation of fact can be found in the complaint (R. 6-20) nor in respondents' Statement of Facts in support of their motion for summary judgment (R. 275-93).

Thus the agreement by counsel for petitioner that there were no disputed issues of fact in the case could not conceivably justify the Court of Appeals' using summary-judgment procedure once it had decided that the crucial "fact" in the case was one never alleged by respondents. The present case presents a striking illustration of circumstances in which, given the legal standpoint adopted by the Court of Appeals, summary judgment was inappropriate and impermissible. Respondents' argument that petitioner's objection to summary judgment came too late because made only after the decision of the Court of Appeals is absurd, since it was only that decision, and the basis therefor, that presented this issue for the first time. Petitioner did, of course, raise the question to the Court of Appeals in its Petition for Rehearing (pages 10-13), which was denied.

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[1] *Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Co.*, 323 F.2d 290, 303 (D.C. Cir. 1963).

II

THE LOUISIANA STATUTE PURPORTING TO FORBID THE OPENING OF A NATIONAL BANK CANNOT PROVIDE AN ALTERNATIVE BASIS FOR THE DECISION OF THE COURT OF APPEALS

Petitioner's position is that the provision of the Louisiana statute which purports to forbid the opening of a national bank violates the Supremacy Clause of the Constitution of the United States (Article VI, Section 2), and must be stricken under the doctrine of a long line of cases beginning with *McCulloch* v. *Maryland*, 4 Wheat. 316. Respondents' argument is that a provision of the Federal Bank Holding Company Act of 1956, 12 U.S.C. § 1846, has conferred upon or reserved to the states the power to prohibit the opening of national banks chartered by the federal authorities within their boundaries, at least so long as the prohibition is based on reasons connected with the ownership of the stock in the bank by a bank holding company. Petitioner denies that the Federal Bank Holding Company Act had any such intent or effect.

This issue was fully developed and argued both in the District Court and in the Court of Appeals; and it is quite true that the District Court's holding could furnish, if correct, an alternative basis for the result reached by the Court of Appeals. Petitioner would welcome the opportunity to argue this constitutional issue before this Court. Indeed, respondents' injection of this issue into the case furnishes an additional reason why certiorari should be granted. The question is one of considerable importance in the operation of the distinctively American dual banking system and

the proper allocation of power between the states and the Federal Government in the establishment and regulation of national banks. Upon analysis the decision of the District Court must be rejected and the Louisiana statute in question stricken down as an unconstitutional interference with instrumentalities of the Federal Government.

The question presented is simply expressed: whether a state may prohibit a duly constituted and chartered national bank from doing business within the state because of state disapproval of the owners of its stock. If this question is answered in the affirmative, as the District Court answered it, there will be created a serious threat of state interference with the functioning of the national banking system.

The Louisiana statutory provision in question reads as follows:

> "It shall be unlawful:
>
> * * * *
>
> "(5) for any bank holding company or subsidiary thereof [defined as any company 25% of the stock of which is owned by a bank holding company, which in turn is defined as any company which owns 25% of the stock of any bank] to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued. . . ." 6 Louisiana Rev. Stat. § 1003(5).

A. CONGRESS HAS PRE-EMPTED THE FIELD OF THE CHARTERING AND ESTABLISHMENT OF NATIONAL BANKS

This statute, as applied to national banks, must be assessed in the context of a long history of federal chartering of national banks in order to provide a uniform nationwide banking system not subject to vagaries imposed by the laws of the several states. A series of provisions in the National Bank Act, 12 U.S.C. § 21-28, sets forth a complete and systematic scheme for the establishment and chartering of national banks by a federal official, the Comptroller of the Currency. The act sets forth the purposes for which the Comptroller is authorized to charter new national banks, the matters to be investigated by him and the criteria on which his decision shall be based, and provides that the Comptroller shall issue his certificate authorizing the new bank to open for business when he determines that the bank "has complied with all the provisions of this chapter [the National Bank Act] required to entitle it to engage in the business of banking." 12 U.S.C. § 26.

The statutory pattern laid down in these sections is complete and self-contained. There is no reference to state law, no provision that state officials shall be consulted or even informed that a new national bank is being established within the boundaries of the state, and not the slightest suggestion that state law or state policy is in any way relevant to the Comptroller's right and duty to apply federally established criteria in the establishment of new units as constituent parts of the national banking system.[2] It has been consistently held

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[2] The statutory scheme for the establishment of national banks thus stands in marked contrast to certain other aspects of the

that the provisions just discussed express a congressional intention to pre-empt the field of the establishment and chartering of national banks. *Deutrick* v. *Greaney*, 309 U.S. 190, 194; *Cook County National Bank* v. *United States*, 107 U.S. 445.

The enactment by Louisiana of a statute purporting to forbid the opening of national banks in certain circumstances found undesirable by the state thus creates a plain conflict between state law and federal law. The National Bank Act says that the Comptroller may issue a certificate if he finds that a national banking association has complied with all the provisions of the National Bank Act itself. Louisiana, and the District Court, now say that compliance with the National Bank Act is not enough; the Comptroller may not issue his certificate and the bank may not open unless it has complied with further requirements which may be imposed by the laws of the state where the bank's operations are to be located.

McCulloch v. *Maryland*, 4 Wheat. 316, was the first of a long line of cases holding attempts by states to interfere with the national banking system unconstitutional under the Supremacy Clause. Others are *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283; *Easton* v. *Iowa*, 188 U.S. 220, and *Franklin National Bank* v. *New York*, 347 U.S. 373. All these cases struck down state legislation which attempted to regulate the operation of national banks in ways which this Court believed to impair their proper functioning as federal instrumentalities. The state statute presently in ques-

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operation and regulation of national banks which Congress has chosen to make subject to state law. One example is 12 U.S.C. § 36(c), which makes state law relevant to the location of branches of national banks. Other examples are listed in the Brief in Opposition of respondent banks, pages 40-41.

tion goes much farther. It attempts to prevent duly authorized federal officials from creating a national bank pursuant to the provisions of the National Bank Act, and to prevent the bank from doing business. This Louisiana statute, if upheld, would prevent a federal instrumentality—a duly chartered national bank—from existing or operating at all.

B. THE CONGRESSIONAL PRE-EMPTION WAS NOT WITHDRAWN BY THE FEDERAL BANK HOLDING COMPANY ACT OF 1956.

The District Court held, and respondents argue, that the Louisiana statute is saved from unconstitutionality by Section 7 of the Federal Bank Holding Company Act of 1956, which reads in its entirety as follows:

> "The enactment by Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof." 12 U.S.C. § 1846.

It is clear from the face of the language of this section that it neither increased nor reduced pre-existing state power, but merely expressed Congress's intention not to pre-empt the field of bank holding company regulation by enacting the Federal Bank Holding Act. Any regulation which a state could constitutionally undertake as to bank holding companies and their subsidiaries before the passage of the Act, it could continue to undertake; any action which was previously unconstitutional would remain so.[3]

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[3] *Cf. Federal Power Commission v. Southern California Edison Co.*, 32 U.S.L.Week 4169, 4172 (U.S., March 2, 1964).

Congress went out of its way to make it altogether clear that Section 7 "does not grant any new authority to States over national banks." S. Rep. No. 1095, Part 2, 84th Cong., 2d Sess. (1956), page 5. Thus Congress in advance specifically repudiated the argument that respondents have made throughout this litigation, that § 1846 somehow involves a grant to the states of authority to regulate national banks which they had not theretofore had. Since Section 1846 simply makes it clear that Congress in 1956 wished neither to expand nor restrict the scope of permissible state legislation of national banks, respondents must give some reason *other than* Section 1846 for their contention that the Louisiana statute presently in question is constitutional in spite of the federal pre-emption of the field of the chartering and establishing of national banks. This they have not done and cannot do.

Respondents rely on *Brachburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N.E.2d 806 (1958), *appeal dismissed*, 359 U.S. 311, as supporting the position they take here. In that case it was held that the United States Constitution was not violated by an Illinois statute which prohibited any new bank holding company from being organized, or acquiring bank stock, after the effective date of the statute. The Illinois statute contained no provision similar to that at issue here, which prohibits duly constituted and chartered national banks from opening and prevents the Comptroller of the Currency of the United States from authorizing such opening. The Illinois statute constituted bank holding company regulation, which may or may not have been within the scope of the authority reserved to the states by 12 U.S.C. § 1846; it was in no way comparable to the Louisiana statute involved

here.[4] The best proof of this is that if Louisiana had passed the Illinois text, instead of the bill it did enact, Whitney-Jefferson could without question have opened for business and no issue of statutory violation could have been raised in this litigation.

The Louisiana statute is by no means mere bank holding company regulation. Its impact is not on the stockholders of a bank, who may be subject to state jurisdiction, but on a national bank itself, which with respect to all essentials of its creation and operation is *not* subject to state jurisdiction. There are all sorts of ways in which a state may constitutionally affect, regulate, or inhibit bank holding companies, but not *all* such devices are necessarily constitutional. Louisiana cannot merely enact a statute called a bank holding company act and claim that *ipso facto* it must be constitutional because of 12 U.S.C. § 1846. While the ultimate objective of 6 La. Rev. Stat. § 1003(5) may be to prohibit the operations of bank holding companies, Louisiana has adopted an unconstitutional means to achieve this end.

The vice of the means chosen by Louisiana is that an existing national bank, which has met all the qualifications laid down by federal law for opening its doors for business, has been prevented from opening. Since the

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[4] Similar in this respect to the Illinois statute, and wholly dissimilar to the Louisiana statute at issue here, are the Georgia act referred to by Senator Maybank during the debate on the Federal Bank Holding Company Act (R. 409-411), and the New Hampshire bill approved in *Opinion of the Justices*, 102 N.H. 106, 151 A.2d 236 (1959). Respondent banks' contention that the Louisiana statute stands or falls with the Illinois, Georgia and New Hampshire statutes, Brief in Opposition of Respondent Banks, pages 39-43, is thus wholly erroneous.

national bank is a federal instrumentality, chartered to perform federally protected and authorized functions, the operation of the Federal Government itself has been impaired. On analysis, Section 1003(5) is no different in its impact on federal authority than would be a state statute which prohibited the opening, or required the closing, of a national bank if, for example, more than a stated percentage of its stock was held by a religious or a labor organization. Even assuming *arguendo* that the state could validly prohibit such organizations within its boundaries from owning the stock of national banks—itself a dubious proposition—it plainly does not follow that the state could prohibit a national bank from opening for business merely because of the existence of such stock ownership.

The difference between what Louisiana has done and a statute merely regulating stock ownership by bank holding companies is by no means one of form only. If Louisiana had passed a statute forbidding the acquisition of bank stock by bank holding companies, or even one requiring divestiture of prior-acquired stock (which would raise grave but different constitutional questions if applied to stock in national banks), the Comptroller could and would have granted his certificate here, and Whitney-Jefferson could have opened on schedule. Any attempted state regulation of the stock ownership of the bank would be a matter between the state and the bank holding company, a business corporation subject to the jurisdiction of the state. The bank would be open for business; the state's attempt to regulate its ownership would have no effect on its ability to perform the functions for which it was chartered by the Federal Government, and it would be performing those functions today. Thus, the difference between bank holding company regulation and what

Louisiana has done here could not possibly be greater; in the one case, the bank would be in operation, and in the present case it is not.

CONCLUSION

For these reasons as well as for the reasons presented in petitioner's Petition for a Writ of Certiorari and in the Petition for a Writ of Certiorari of James J. Saxon, Comptroller of the Currency, in No. 798, petitioner prays that a writ of certiorari issue.

Respectfully submitted,

MALCOLM L. MONROE,
1424 Whitney Building,
New Orleans, Louisiana.

DEAN ACHESON,
W. GRAHAM CLAYTOR, JR.,
701 Union Trust Building,
Washington 5, D.C.
Attorneys for Appellant Whitney National Bank in Jefferson Parish.

MONROE & LEMANN,
WALTER J. SUTHON, III,
JERRY A. BROWN,
1424 Whitney Building,
New Orleans, Louisiana.

COVINGTON & BURLING,
BRICE M. CLAGETT,
701 Union Trust Building,
Washington 5, D. C.
Of Counsel.

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